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No. 10-516

Supreme Court, U.S.
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In The
Supreme Court of the United States

BOBBY J. RAST, DANIEL B. (DANNY) RAST, AND RAST CONSTRUCTION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This reply brief is filed by Petitioners to respond to the brief in opposition filed by the Respondent.

ARGUMENT

I. Respondent's argument overemphasizes the general nature of statutory language and ignores the realities and requirements of a specific prosecution.

In somewhat of a departure from positions taken by the Respondent in the District Court and in the Eleventh Circuit, Respondent's brief dwells on the generality of the language in 18 U.S.C. §666. In doing so it fails to recognize the immutable conclusion and understanding that criminal statutes may be written in general and conclusionary language but when they are applied in individual prosecutions the general and conclusionary language must be transformed to specifics to describe particular individuals, entities, and occurrences which demonstrate a charged crime. This is necessary to the due process notice requirements of the nature and cause of an accusation guaranteed by the Fifth Amendment as well as to the Sixth Amendment assurance of a fair jury trial.

Section 666 is a statute replete with general expressions. It describes in general and conclusionary terms the participants in and the conduct intended by Congress to constitute a crime. That general and conclusionary language does not suffice in the context

of a specific prosecution, in the milieu of indictments, evidence, and jury instructions, to describe in a meaningful way the alleged conduct that constitutes a specific violation or the participants in that alleged conduct which are charged to be the basis for a criminal conviction. As it relates to §666(a)(2), this means that an indictment, the evidence, and the jury instructions must supply specificity rather than the general labels, such as "corruptly," "any person," "an agent," "anything of value," "intent to influence or reward" and "in connection with any business, transaction, or series of transactions," found in the statute.

The Respondent apparently does not dispute the general assumption that a bribery, including a bribery under §666, requires a *quid pro quo*. Respondent's argument is simply that the *quid pro quo* need not be identified, whether in the indictment or the Government's proof. The Respondent seems to be saying that there must be a *quid pro quo*, which means proof of an exchange, this for that or these for those. A *quid pro quo* (which is nothing more than an exchange) makes no sense in a particular criminal prosecution if the items (benefits) being exchanged are not identified. The exchange charged in a particular prosecution obviously cannot be stated and proven unless the *quid pro quo* (both the "*quid*" and the "*quo*") is identified. To permit otherwise would allow the Government at trial to simply throw out different theories and hope one sticks. Such is constitutionally impermissible. See *Russell v. United States*, *369 U.S. 749, 763 (1962)*.

Respondent's brief points out, as did the Eleventh Circuit opinion, that §666 does not use the expression "*quid pro quo.*" This omission is of no significance. Neither does §201. In enacting §666 Congress was unquestionably undertaking to criminalize bribery committed by persons other than federal officials where federal funds were involved. See 1984 U.S.C.C.A.N. 3182, 3510; *United States v. Jennings, 160 F.3d 1006, 1012-13 (4th Cir. 1998).* Certainly, Congress was aware that the concept of bribery included the concept of a *quid pro quo*. Consequently, Congress, in enacting §666 so as to extend the bribery offense to cover other persons, intended it to include the *quid pro quo* requirement for state, county, and local officials and others where federal funds are involved. It would make no legal or procedural sense to have a different standard.

There can be no doubt that this Court has recognized that bribery under §201 requires a *quid pro quo*. *United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404-05 (1999)* makes this clear. This being true, it is futile to contend §666 does not include a *quid pro quo* element since, as discussed above, they are kindred statutes directed toward the same type of misconduct. The Respondent is attempting to salvage somewhat the Eleventh Circuit opinion by saying that it recognizes the requirement for a *quid pro quo*, just not a specific one. While Petitioner does not agree with that interpretation of the Eleventh Circuit opinion, if that were the case the

Eleventh Circuit opinion and Respondent's brief are tilting at a windmill.

If §666 includes a *quid pro quo* requirement it is nonsensical to argue that a specific prosecution may be maintained and a conviction had where either the "*quid*" or the "*quo*" are not identified in the accusation and in the evidence and in the jury instructions used by a jury in weighing the evidence.

The citation in Respondent's brief of *Salinas v. United States, 522 U.S. 52 (1997)* and *Sabri v. United States, 541 U.S. 600 (2004)* as decisions of this Court supporting the "no *quid pro quo*," or "nebulous *quid pro quo*," position are misplaced. In the *Sabri* case the question decided, as it relates to §666, was that §666 was a valid exercise of Congressional authority. In the *Salinas* case the only question involving §666 was whether it was limited to cases where the conduct of the accused directly affected federal funds. Neither of these opinions hint that it is proper to convict of bribery without proof of a specific *quid pro quo*. The argument in Respondent's brief that the *Ganim* and *Jennings* cases approve an unspecific identification of the *quid pro quo* in a bribery prosecution by approving what is described as a "stream of benefits" theory does not support the argument of Respondent's brief that proof of a specific *quid pro quo* is not required. In those cases each individual benefit was specifically identified. In the *Jennings* case individual building contracts were awarded to a contractor following his individual payments to a city official. In the *Ganim* case it was a specific series of city contracts awarded

by a defendant mayor, each of which was fully identified and related to payments or other benefits given the mayor.

II. The Eleventh Circuit decision conflicts with a decision of this Court.

In support of its argument that the decision of the Eleventh Circuit in the present case does not conflict with this Court's decision in *United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999)* the Respondent's brief argues that the *Sun-Diamond* case did not involve §666. While this is abstrusely true it is practically and realistically untrue. The Respondent attempts to limit *Sun-Diamond* to its holding regarding the illegal gratuity part of §201, i.e., §201(c)(1)(A), but in deciding that issue, the Court clearly recognized that under §201(b), the bribery part of the statute, that a specific *quid pro quo* is required.

As was pointed out in the petition, §666 was enacted by Congress for the express purpose of extending the bribery offense described in §201(b) to state officials and others where federal funds were involved. See 1984 U.S.C.C.A.N. 3182, 3510. Congress obviously meant for the basic elements of bribery to be the same in §201(b) and in §666. Consequently, the *Sun-Diamond* definition of bribery is applicable to this case. The Eleventh Circuit concept of §666 bribery is obviously in conflict with the *Sun-Diamond* concept.

III. A decision clarifying the requirements for a bribery conviction is important to uniformity and consistency in federal criminal jurisprudence.

Respondent's brief generally belittles the importance of a decision clarifying the elements of bribery in Federal criminal prosecutions. According to the Department of Justice Public Integrity Section, in the year 2009, 1,082 individuals were charged with public corruption offenses and in the 20 year period between 1999 and 2009, a total of 23,179 individuals were charged in public corruption cases. See, Report to Congress on Activities and Operations of the Public Integrity Section for 2009, Public Integrity Section, Criminal Division, United States Department of Justice, 51-53. It is common knowledge that many, probably most, public corruption cases involve bribery in some form.

An unscientific search of the Westlaw data base by Petitioners' counsel revealed that in the past 10 years 204 cases in United States Courts of Appeals have involved either §666 or §201. The recent decision of this Court in *Skilling v. United States, 130 S.Ct. 2896 (2010)* assigns a new and expanded role to the concept of bribery in Federal prosecutions, e.g., this Court said that in honest services cases under 18 U.S.C. §1346 the lower courts should look to §201 and §666 to "draw content" of bribery. *Skilling*, 134 S.Ct. at 2934. If bribery under §201 means one thing and under §666 another the "content" to be drawn is confusing. Consequently, due to the significance of

Skilling in many current and future prosecutions, and the large number of bribery cases being prosecuted, the present case presents a compelling entreaty for the exercise of this Court's supervisory powers to ensure uniformity and consistency of Federal criminal laws relating to bribery. A decision providing this clarity is of great importance to Federal criminal jurisprudence.

IV. The harmless error doctrine does not apply to this case.

Respondent's brief injects the harmless error doctrine as a reason for not granting certiorari in this case (Br.16). It argues that even if Petitioner's position that the *quid pro quo* exchanged in a bribery must be identified this would not affect the ultimate outcome of this case. This argument overlooks several salient points.

First, this is not a case where the benefits flowing from the Petitioners to public officials were not explained by evidence of innocent causation. Substantial evidence (see App.343-486) explained non-corrupt reasons for Petitioners' gifts to the county officials. Without requiring proof of some nexus between a gift and an identifiable benefit accruing to the giver in exchange for the gift, which the jury was instructed was not required under the law applicable to this case, the jury was effectively told it should ignore all of the evidence explaining an innocent motive for any gift. Such erroneous instructions were particularly

not harmless in this case where Petitioners were charged (and convicted) of multiple briberies, each associated with a particular gift by Petitioners but not associated with a particular benefit received or promised to Petitioners in exchange for the particular gift, and there was an absence of any evidence of any discussions, promises, or agreements for any exchange. The evidence was that the Rast Defendants and Rast Construction had been doing business with Jefferson County for fifty years or so and had an outstanding reputation.

It also should be noted that this is not a case like *United States v. Jennings*, *160 F.3d 1006 (4th Cir. 1998)*, which Respondent's brief cites and relies on for its harmless error argument. In that case the defendant denied making any payments and the primary issue was whether the payments were in fact made, not whether they were innocently made. That case, where overwhelming evidence proved the payments and no evidence provided an innocent explanation for them, does not support a harmless error argument as excusing an erroneous *quid pro quo* jury charge in this case.

The harmless error argument is especially unavailing in this multiple bribery conviction case. The Petitioners stand convicted of multiple counts of bribery. No identifiable *quid pro quo* distinguishes one count from the other. Further, even if the "stream of benefits" theory of *quid pro quo* mentioned in Petitioners' brief were a valid theory and was adapted to this case, this case would consist of a

single bribery, not multiple briberies. Therefore, the harmless error doctrine does not support a conclusion that resolving the conflict between the decision in this case and other decisions of this Court and the conflict between the Circuits would not affect the ultimate outcome of this case.

CONCLUSION

For the reasons discussed above and in their petition for writ of certiorari, Petitioners pray that their petition be granted.

Respectfully submitted,

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